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No. 209

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 17–26) is reported at 180 F. Supp. 342.

JURISDICTION

The judgment of the Court of Claims was entered on January 20, 1960. The petitioner's motion for rehearing was denied on April 6, 1960. The petition for a writ of certiorari was filed on July 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims applied the proper measure of damages in the particular factual circumstances of this case.

2. Whether petitioner should have been given a second opportunity in that court to present further evidence on damages.

STATEMENT

This action was brought by petitioner in the Court of Claims for an alleged breach of its contract with the United States.[1] Under the contract, petitioner agreed to obtain tungsten from designated sources to be developed by it in Portugal, for sale and delivery to the United States. After a full trial, the court ruled that the United States had committed a breach of the contract, and awarded damages of $508,200 (Pet. App. 26). Since the sole question raised by the petitioner is the adequacy of the damages awarded, we shall set forth only those findings[2] and portions of the opinion below that deal with that issue.[3]

1. THE FINDINGS WITH REGARD TO THE NEGOTIATION AND TERMS OF THE CONTRACT

As the court below held (Pet. App. 25–26), one of the Government's "prime purposes in making the contract [was] to make possible the opening up and development of new sources of tungsten." In 1951, the

[1] The petitioner is a Portuguese corporation, and its suit was properly before the Court of Claims under the reciprocity provisions of 28 U.S.C. 2502.

[2] The court's "voluminous findings of fact" "coincide[d]" with those of the trial commissioner (Pet. App. 18).

[3] In holding against the Government, the court rejected the contention that there had been a violation of the provision in the contract against payment of contingent fees for securing it. The facts relating to that issue are set forth in a conditional cross-petition, which the United States is filing simultaneously herewith.

United States was concerned about the adequacy of the tungsten sources in the world available to it (F. 21–23).[1] On July 1, 1951, the Director of Defense Mobilization stated that new tungsten mines had to be developed in "Marshall plan countries" and that long-term contracts and loans might be utilized to accomplish this purpose (F. 22).

Although Portugal was a leading western nation in reserves of tungsten (F. 21(b)), its tungsten industry had suffered from lack of both a stable world market and development and organization of its mines (F. 24–30). It was essentially a "pick-and-shovel operation", conducted in large part by "pilhas", the Portuguese term describing individual peasants and their families (F. 24(e), 29(a)). Moreover, any attempt to organize a profitable tungsten industry in Portugal was hampered by stringent Portuguese government controls, including heavy license and export taxes (F. 25, 26). After World War II, the Portuguese tungsten industry was in a depressed and unorganized state, using archaic patterns of mining and marketing (F. 28, 29).

In June 1951 three men conceived the idea for the petitioner's formation—a Portuguese citizen, Dr. Soares, who had a plan to organize and develop certain tungsten sources in Portugal, and two Americans, Colonel Westbrook and Mr. Pulvermann, who were to seek a potential purchaser for any company that might be formed on the basis of Dr. Soares' plan (F. 31, *et seq.*). After considering possible capital

[1] "F" refers to the pertinent finding of the court below.

sources and contracts, Colonel Westbrook and Mr. Pulvermann determined to seek a long-term contract with the United States (F. 31, *et seq.*). During ensuing protracted negotiations with the United States, these men dealt primarily with officials of the Emergency Procurement Service of the General Services Administration, which was essentially responsible for obtaining tungsten for stock piling; and with officials of the Defense Materials Procurement Agency (DMPA) (the agency with which the contract was finally negotiated), which was charged by law with the responsibility for encouraging the exploration, development and mining of critical and strategic minerals and metals (F. 11-20).

In one of his first overtures to the American Government, Colonel Westbrook, in a memorandum dated July 24, 1951, stressed the need of the United States to counter Russian acquisition of tungsten sources with development of sources in Portugal through Companhia Atlantica (F. 43). Indeed, from the outset, petitioner's attempts to obtain a contract were consistently based on the asserted mutual needs of the parties, *i.e.*, the need of the United States for developed tungsten sources in Portugal for which it would be willing to enter into a long-term, fixed-price contract, and the need of the petitioner for such a contract, by means of which it could profitably organize and develop its affiliated Portuguese mines despite volatile world tungsten prices and heavy Por-

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[1] The pertinent provisions of the Defense Production Act of 1950, 64 Stat. 798, and of Executive Order No. 10281, 16 F.R. 8789, are set forth in Findings 16 and 18.

tuguese taxes (F. 43, *et seq.*). The modernization and expansion of these mines as considerations calling for a long-term contract with the United States were again emphasized by Colonel Westbrook in a letter of September 13, 1951, to DMPA officials, which reported the incorporation of the petitioner and the names of its officers and affiliated mining companies (F. 51).

In October, 1951, the petitioner made a written offer that similarly reflected the purpose to produce and furnish tungsten to the United States from its affiliated mines in Portugal (F. 58(a), (b), 60(a)). The petitioner submitted to United States officials proof of its ability to produce the tungsten from these mines (F. 60(c), (d), 61(c)). This purpose underlies practically all subsequent written communications between the parties prior to execution of the contract. For example, Colonel Westbrook's letter of November 17, 1951, again emphasized increasing the production of tungsten in the petitioner's Portuguese mines (F. 63(b)); in another memorandum, he stressed the importance of giving the United States a "dependable future market" in Portugal (F. 64(b), (c)); and, in his report of December 19, 1951, Colonel Westbrook once again summarized the developmental

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The legal relationship between petitioner and its affiliated mines is set forth in Findings 64 and 65. Essentially, petitioner entered into contracts with its affiliated mines, under which the mines were to sell their production of tungsten to petitioner for performance under petitioner's long term contract with the United States. Petitioner also proposed to aid these affiliated companies with financing and equipment (F. 64, 65, 66).

nature of the venture (F. 66). When United States government officials insisted that, since tungsten could be obtained by spot purchases on the open market, the fixed prices suggested by the petitioner should be lowered because of the burden of a long-term contract (F. 72(c)), Colonel Westbrook wrote these officials, on behalf of the petitioner, that (F. 73(a)):

> * * * a policy which puts a premium on spot prices, as compared with prices offered for increased production requiring producers to make heavy expenditures for the necessary expansion of their facilities, defeats the basic purpose of the legislation enacted by Congress to increase the availability of the product. * * *

Following further negotiations, the submission of additional engineering reports as to the prospective ability of the petitioner's mines to produce, and an on-the-spot investigation of this latter question by an American engineer, the parties turned to drafting an acceptable agreement (F. 79, 81, 84). Money for the contract was made available, under § 304 of the Defense Production Act of 1950, to the Defense Materials Procurement Administrator, who, as we have noted, *supra*, p. 4, was primarily responsible for the exploration, development and mining of critical metals (F. 100(a), 18(c)).

On September 11, 1952, the contract between the petitioner and the United States, acting through the Defense Materials Procurement Agency, was signed (F. 104). It provided, in essence, for the delivery of tungsten by the petitioner to the United States at fixed prices during a three year period (F. 3(b))

and gave the United States the right to cancel the contract if the Government determined, *inter alia*, that the petitioner had obtained it for the purpose of speculation (F. 3(b)). The contract recited the following underlying premises (F. 3(b)):

> WHEREAS, the Government is desirous of promoting the development of new sources of tungsten * * * concentrates and in procuring tungsten concentrates in quantity; and
>
> WHEREAS, the Contractor is desirous of increasing the productive capacity of its tungsten mines in Portugal (including the enlargement of its milling facilities) and the productive capacity of other small Portuguese producers with whom Contractor intends to merge, consolidate, or otherwise combine its efforts to secure increased production of tungsten * * *

The contract was cancelled by the Government a little more than one month later when officials in Washington were informed that the petitioner was purchasing tungsten in the open market for delivery under the contract (F. 122(b), 123). The petitioner attempted unsuccessfully to reinstate the contract, claiming that it was not buying on the open market and that it was ready to perform the terms and conditions of the contract (F. 127). The petitioner had never produced any of the tungsten for the contract at the time of cancellation, its mines remaining nonoperative (R. 23).

2. THE FINDINGS WITH REGARD TO DAMAGES

The Court of Claims found that one of the purposes intended by the Government to be served by

the contract was the expansion of tungsten production in Portugal, and that this fact was known by the petitioner's representatives who negotiated the contract (F. 140(a)); that one of the purposes contemplated by the petitioner from the contract was the expansion of production in its affiliated mines in Portugal, a fact known to United States officials who negotiated the contract (F. 140(b)); and that the prices under the contract were based more on the production and expansion costs of marginal producers than on market prices (F. 140(a), fn. 16).

The court further found that in September 1952, when the contract was signed, the world demand for tungsten had been slackening for some time and accompanying price declines had occurred (F. 154). These declines had been under way long enough to dry up sources of supply both in the open market and from the pilhas in Portugal (F. 154). The court found that the petitioner could not have obtained tungsten in the open market, and had to depend for its supplies solely on its affiliated mines and whatever it could obtain from Portuguese pilha production (F. 154).[7]

As for the negotiation and terms of the contract itself, the court found that the basic amount of

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[7] The trial commissioner concluded that the United States did not cancel the contract "to escape one commitment to buy tungsten in order to procure the same commodity at a lower price". He found the reasons for cancellation had nothing whatever to do with the drop in the market price. His extensive findings, adopted by the court below, fully support this conclusion.

tungsten to be delivered under the contract was intended by the parties to be produced by mines owned by or affiliated with the petitioner in Portugal (F. 155(a)). It noted that the contract permitted delivery of an overrun of tungsten (an amount over the required amount), and that the parties intended that most of the overrun would also be obtained from Portuguese production, through purchases from Portuguese pilhas, pickers and dealers (F. 155(b)). The court further found that, at the time of the contract negotiations, the parties recognized that "some of the overrun might have to be acquired by purchases in the open market", but that the negotiators, at the time, were unaware of the depletion of the available supply on the open market due to the decline in demand and prices (F. 155(b), (c), fns. 63 and 64); and that market conditions existing at the time the contract was signed would have made it necessary for the petitioner to rely solely on Portuguese production alone (F. 155(c)).

The court found that if the petitioner's damages were ascertained by the rule of contract price less cost of performance (which assumed that the petitioner had to supply the tungsten for this contract from its Portuguese sources), the loss, based on the evidence introduced on cost of performance, was $508,200 (F. 161–168). However, if the petitioner's damages were calculated on the basis of contract price less market price (which assumed that the petitioner could supply the tungsten from open market purchases), it would be entitled to $6,166,455.25 (F. 156–

160).* Since it had found that the petitioner was limited by the contract to the Portuguese sources of supply and was not free to shop in the open market, the court concluded (F. 157) that the petitioner's loss from the cancellation of the contract "is reflected by the difference between the contract price and the cost of performance", and awarded damages of $508,200.

3. THE OPINION BELOW

In its opinion (Pet. App. 25–26), the Court of Claims again rejected the petitioner's contention that, had the contract remained uncancelled, it was free to purchase tungsten in the open market for delivery to the United States; and that it was therefore entitled to damages based on the difference between contract price and market price. The court stated that the contract required the petitioner to supply tungsten from the Portuguese sources of production, and that both the petitioner's offer and the Government's ultimate acceptance were based upon, and would not have been made without, "the opening up and development of new sources of tungsten" (Pet. App. 26). It pointed out (*ibid.*) that, since the total damages awarded were "all that [the petitioner] would have made if it had been permitted to perform its

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* The difference between market price and cost of performance is due to the two factors noted by the court below: (1) the slackening of world market demand and resultant price decline of tungsten even before the contract here was negotiated in September 1952, and (2) the high cost of production and performance in Portugal.

contract, such a judgment will compensate it for the Government's breach of contract."

The petitioner filed a motion for rehearing, seeking another opportunity to introduce evidence on cost of performance, on the ground that it had tried the case on the theory that contract price less market price was the applicable rule of damages. The Court of Claims denied the motion.

ARGUMENT

The petitioner contends (Pet. 8–14) that the contract here was a simple "purchase and sale" agreement (Pet. 8), under which it was free to obtain the tungsten through open market purchases; and that under the rule of *United States* v. *Burton Coal Co.*, 273 U.S. 337, the proper measure of damages in such a case is the difference between contract price and market price, and not between contract price and cost of performance. This argument, however, ignores the specific and detailed findings of the Court of Claims that the contract required the petitioner to obtain the tungsten from Portuguese sources, and that it could not obtain the metal in the open market. This factual determination as to the petitioner's rights under the contract, upon which the court below based its measure of damages, is fully supported by the court's lengthy subsidiary findings; it distinguishes this case from *Burton Coal*, where the contract permitted the seller to purchase on the open market (see *infra*, pp. 15–18). This case, therefore, presents no important issue on the law of damages, but only the correctness of the findings below that the contract

obligated petitioner to supply tungsten from Portuguese sources; and there is no conflict with *Burton Coal*.[*] Accordingly, there is no occasion for further review by this Court.

1. The subsidiary findings of the Court of Claims, which underlie its ultimate finding that the petitioner was not free to purchase tungsten in the open market, are summarized in the Statement, *supra*, pp. 2–10. The petitioner makes no attempt to show that these findings are erroneous. The findings are supported both by the history of the lengthy negotiations between the petitioner's representatives (Colonel Westbrook and Mr. Pulvermann) and the Government officials, and by the preamble to the contract itself, which states that the Government "is desirous of promoting the development of new sources of tungsten * * * concentrates" and that petitioner is "desirous of increasing the productive capacity of its tungsten mines in Portugal * * * and the productive capacity of other small Portuguese producers * * *" (F. 3(b)).

The petitioner's contention that the contract sanctioned open-market purchases further ignores the fact that the petitioner itself asserted throughout the negotiations that a long-term, fixed-price contract was not unduly burdensome to the United States, since

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[*] Contrary to the petitioner's assertion (Pet. 11), the court below took specific notice of the petitioner's reliance on *United States v. Burton Coal Co.*, 274 U.S. 337, discussed *infra*, pp. 15–18, and apparently considered such reliance unwarranted in view of its finding that the petitioner was not entitled under the contract to supply tungsten from the open market (F. 157, fn. 67). See also the extensive discussion of *Burton* in the trial commissioner's opinion.

the latter would obtain the benefit of a newly developed source of supply for the future in place of the usual delivery from the open market.[10] The claim also ignores the petitioner's denial, both upon receipt of the notice of cancellation and during this litigation, that it was operating in the open market.[11] In view of the year and a half of negotiations in which the petitioner endeavored to convince Government officials that it was capable of financing its developmental project in Portugal and of producing tungsten from the developed sources, and its procurement of the contract on such proof of ability to perform, the petitioner's present contention that the contract merely reflected the hope of Portuguese production, but not a firm commitment, is but a belated afterthought.

The finding of the Court of Claims that, at the very end of the negotiations, the parties contemplated that a small amount of the first period overrun might have to be obtained through purchases on the open market (F. 155(b), 141(b), 153, fn. 59), is in no way inconsistent with the court's conclusion that the contract was basically one for tungsten produced in Portugal. Moreover, the court found that even this minor portion of the overrun could not have been obtained from

[10] See *e.g.*, the letter of Colonel Westbrook, described in Finding 73(a), *supra*, p. 6.

[11] As the trial commissioner below observed in his opinion, "[the petitioner] cannot have it both ways: that the contract was for the sale and delivery of tungsten without regard to the development of mining resources *and* was not obtained by [the petitioner] for the purpose of speculation. The entire history of the origin of Atlantica and the negotiation of the contract with DMPA rests upon promotion of production and mining". (Emphasis supplied.)

non-Portuguese sources, since the decline in world demand had dried up the open market in tungsten (F. 155(c), 154).

2. The petitioner further errs in its assumption (Pet. 8–9) that the general rule of damages for breach of a purchase and sale contract is the difference between contract price and market price. Passing the fact that the court below here found that this was not such a contract (see *supra*, pp. 8–11), there is, we submit, no such general rule of damages in these cases. Rather, the basic principle of damages is that the party injured by a breach of contract is entitled only to those damages which may be said to arise naturally from the breach and which were within the reasonable contemplation of the parties at the time the contract was made. *E.g., Hetzel* v. *Baltimore & Ohio Railroad*, 169 U.S. 26, 37; *Doe* v. *Humbert*, 91 U.S. 294, 299; *Schlottman* v. *Pressey*, 195 F. 2d 343 (C.A. 10); *Needles* v. *United States*, 101 Ct. Cls. 535; *McCormick on Damages*, § 173 (1935).[*] There are no rigid rules applicable in all cases but only flexible guides dependent upon the particular factual circumstances involved. *Illinois Cent. R. Co.* v. *Crail*, 281 U.S. 57, 64–65; *Brunswick-Balke-Collender Co.* v. *Wisconsin*

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[*] As Professor Corbin puts it, 5 Corbin *on Contracts* § 1002 (1951):

> The rules of law governing the recovery of damages for breach of contract are very flexible. Their application to the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court leaving much to the individual feeling of the court created by the special circumstances of the particular case.

Mat Co., 24 F. 2d 78 (C.A. 7); *Needles* v. *United States*, *supra*.

Where, prior to performance by the seller or producer, a purchase and sale contract is repudiated by the buyer, the ordinary measure of damages is the difference between the contract price and the cost of performance. *United States* v. *Purcell Envelope Co.*, 249 U.S. 313; *Rockm* v. *Horst*, 178 U.S. 1; *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F. 242 (C.A. 8). Although damages measured by contract price less market price may be awarded where the cost of performance would be greater than market price, this is done only where the seller or producer is free to obtain the goods on the open market. *Rice* v. *Schmid*, 18 Cal. 2d 382, 388; *McCormick on Damages*, § 173, pp. 658–659 (1935). See also note, *Seller's Recovery When Buyer Repudiates Before Completion of Manufacture*, 99 U. Pa. L. Rev. 229, 234 (1950). The rationale is that, if the market price drops and if the seller is free to purchase on the open market, the fair measure of his loss resulting from the breach must reflect the fact that his profits would have been greater had he purchased on the market instead of delivering his own production. Where, however, as here, the contract does not permit open market purchases, the normal rule measuring damages by the difference between contract price and cost of performance fully compensates the seller for the damage he suffered from the breach.

United States v. *Burton Coal Co.*, *supra*, is not, as the petitioner contends, in conflict with the decision below. In *Burton*, the United States entered into a

fixed-price contract with a supplier of coal to purchase coal for army camps during World War I. While the contract identified several mines as the seller's source of supply, it further provided that the seller "might furnish coal from other mines if, for any reason for which it was not responsible, it should be unable at any time to furnish coal in sufficient quantities from the mines mentioned" (273 U.S. at 338). After accepting some coal, the Government "refused to take or pay for any more," although the seller "was ready to deliver the balance" (p. 339). The Court of Claims awarded damages based on the difference between the contract price and the market price. This Court, in affirming, held (p. 340) that "[t]he contract was not for production or mining, but for sale and delivery of coal." It pointed out (*ibid.*) that the seller "was bound to deliver the quantity of coal covered by the contract"; that "[f]ailure of the sources referred to in the contract would not excuse it"; and that "[i]n contemplation of law it could have obtained the coal at market prices prevailing at the times when deliveries were required under the contract."

In other words, from the Government's point of view the essential purpose of the contract in *Burton* was to obtain coal; and the designated sources were merely incidental, not crucial. Here, on the other hand, as the findings establish, the crucial element of the contract, and the reason for its execution, was the development of new sources of tungsten in Portugal. This contract, therefore, was one "for production, or

mining" and not just "for sale and delivery," of tungsten.[*]

There is another significant distinction between this case and *Burton*. In *Burton*, as the trial commissioner here noted, the Court of Claims had emphasized that the apparent motive for the Government's cancellation of the contract was the fact that it could have obtained the coal on the open market at a lower price than the contract provided. *Burton Coal Co.* v. *United States*, 60 C. Cls. 294, 314. In that situation, awarding damages to the seller based on the difference between contract price and cost of performance would result in a windfall to the Government, which had broken the contract. In the instant case, on the other hand, as the trial commissioner concluded (based on his extensive findings adopted by the Court of Claims), the primary motive for the Government's cancellation was its honest belief that the petitioner was speculating in the open market; the cancellation was not related to the drop in the open market world tungsten price. Since the petitioner was not free to satisfy the contract through open market purchases, the Court of Claims correctly found that damages based on the difference between

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[*] See *McCormick on Damages*, § 173, pp. 658-659 (1935), and Note, 27 Col. L. Rev. 877 (1927), for comments on the *Burton* decision. Both commentators conclude that the rule of damages applied in *Burton* is only justified in view of the construction of the contract there as allowing for purchases by the supplier on the open market. See also, Note, *Seller's Recovery When Buyer Repudiates Before Completion of Manufacture*, 99 U. Pa. L. Rev. 229, 234 (1950).

contract price and cost of performance fully compensated petitioner for the "extent of the loss suffered by [it] in consequence of [the Government's] cancellation of the contract * * *" (F. 157). In these circumstances, awarding damages to petitioner on the basis of the difference between contract price and market price would result in a windfall to it of more than $5,000,000.

3. There is no merit to the petitioner's contention (Pet. 14-15) that it should have been given an opportunity to introduce additional evidence on the damages question. The argument is that the petitioner presented its case under the belief that *Burton Coal* was applicable, and did not anticipate that another measure of damages would be applied; and that it has additional evidence relating to cost of performance that would establish a greater loss of profits than that found by the Court of Claims. The petitioner, however, was specifically apprised during the trial of the Government's theory of damages (Tr. 2210-2220), and was thus fully on notice that its own theory was being contested. The petitioner had full opportunity at the trial to introduce all its evidence on the damages issue, but elected not to do so. It is not entitled to a further trial on the damages question merely because the Court of Claims rejected its legal theories.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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